EMPLOYMENT TRIBUNALS

BETWEEN

Claimant		Respondent
GEOFFREY GRANT	**AND**	**SAFETY KLEEN U.K. LTD**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT: **ON:** **20TH / 21ST MARCH 2019**
PONTYPRIDD

EMPLOYMENT JUDGE MR P CADNEY **MEMBERS:**

APPEARANCES:-

FOR THE CLAIMANT:- **MRS D GRANT**

FOR THE RESPONDENT:- **MR KHAN (COUNSEL)**

JUDGMENT

The judgment of the tribunal is that:-

1. The claimant's claim for unfair dismissal is dismissed.
2. The respondent's application for costs is dismissed.

Reasons

1. By this claim the claimant brings a claim of constructive unfair dismissal.

2. The claimant was employed by the respondent as a service support representative between the 4th November 2013 and the 19th September 2017, he having tendered his resignation on 13th September. As this is a claim for constructive unfair dismissal it must be demonstrated that the respondent was in fundamental breach of contract entitling the claimant to resign. At the risk of stating the obvious it is not sufficient for the claimant simply to prove that he had subjectively reached the point that he no longer felt able to work for the respondent. The question for me is whether the events about which the claimant complains are objectively, individually or cumulatively, fundamental breaches of contract on the part of the respondent entitling him to resign. It is not alleged that the respondent is in breach of any express term of his contract of employment, and accordingly the claim must be based on the implied term of mutual trust and confidence, which is implied into every contract of employment; that the employer shall not without reasonable and proper cause destroy or seriously damage the relationship of mutual trust and confidence.

3. As Mr Khan for the respondent points out, as there is very little dispute of fact, the central question in this case is effectively whether the respondent had reasonable and proper for those actions about which the claimant complains and which undermined his trust and confidence. The respondent has an alternative submission that even if it was in fundamental breach that the claimant did not in fact resign in response to any breach but in order to avoid a disciplinary investigation into the fraud allegations in respect of which there was at least a prima facie case that he was a participant.

4. The claimant makes no complaint about any events before the early part of 2017. At the beginning of 2017 a new branch manager Laura Hearne was appointed. The claimant's case is that he ended up having a poor relationship with her. The specific cause of this is, on the claimant's case, that she asked him to become the Health and Safety officer of the respondents Cardiff branch. He refused as he did not want to be responsible for health and safety as he believed her safety standards were lax, for example he alleges fire exit doors were regularly blocked and flammable material was stored in the warehouse. He believes that from this point she bore him a degree of animosity which resulted in an unfair disciplinary sanction being imposed, and bogus disciplinary investigations being implemented against him which resulted in his resignation.

5. The first matter about which he complains is an incident which occurred overnight on the 5th/6th April 2017. He returned from a customer with a drum of Resinkleen and several drums of used kerosene. He arrived late and was not able to unload that night. He had not labelled the drum containing Resinkleen as he had not taken any labels with him to the customer, but had marked the drum. However when he returned the following morning either the marking had become smudged or removed or he had simply forgotten he one of the drums contained Resinkleen. As a result he

disposed Resinkleen with the kerosene in a dumpster. This is not permitted as the Resinkleen is a form of hazardous waste.

6. This resulted in disciplinary action being taken against the claimant. A disciplinary hearing was conducted by Mr Richard Blythin a Regional Director. He concluded; " *These are the facts that we have ascertained. You knowingly transported hazardous waste without correct labelling, then knowing left the waste on the vehicle overnight without booking it in to the transfer station log and the Flam store. As a result when the next morning you tipped similar drums in the dumpster, as the Resinkleen was not labelled you claim you forgot you had it and tipped it as kerosene. This resulted in thousands of pounds of damage to the dumpster, restricted the branch operation for a few days also exposed the company to EA transportation laws had you been stopped previously without a labelled hazardous drum. In addition flammable wastes were left outside in the vehicle overnight exposing the area to a potential health and safety risk. Is that correct?*" to which the claimant replied " *Yes I made a few mistakes and I hold my hands up*." Mr Blythin then stated " *With this in mind I have no option other than to issue a final warning. You have a right to appeal*.." This was confirmed by a letter of 19th May 2017, which in addition pointed out that the sanction fir a final written warning also included a 75% reduction for a bonus for the month in which the final written warning was given. The claimant appears to have misunderstood that part of the sanction and believed that the deduction in bonus would be made for the whole of the currency of the final written warning rather than only for the month in which it was issued. However this misapprehension was corrected during the appeal.

7. The appeal was heard by Mr Kevin Potter who upheld the original decision.

8. Whilst I have to decide whether there has been a breach of the implied term of trust and confidence looked at overall it is sensible to deal with each of the complaints individually. The claimant essentially states that the reason that he believes the sanction was too harsh is that the decision was pre-determined by Laura Hearne, and that in accordance with the evidence of his witness Mr Watts that had Ms Hearne taken the advice she was given at the time the dumpster could have been isolated with the consequence that Resinkleen would not have entered the rest of the system and there would have a very significant reduction in the amount of damage caused. If there is blame for the amount of damage that lies not with the claimant but Ms Hearne. In addition his long and clean service should have been taken into account before the respondent went to the most serious disciplinary sanction short of dismissal.

9. The respondent points to a number of features. In respect of the participation or otherwise of Ms Hearne, the disciplinary sanction was imposed by Mr Blythin and the appeal rejected by Mr Potter. Ms Hearne was not present at and played no part in either hearing, nor on the face of it in either decision. There is no evidence before me that Ms Hearne played any part at all in either decision. Secondly, as Mr Blythin pointed out in the original disciplinary hearing the amount of the damage was not the central issue. In addition and as is set out in the respondents disciplinary procedure that in fact what the claimant had admitted to having done could, if the respondent

have wished, have been regarded as falling within the definition of gross misconduct and he could have been summarily dismissed rather than being given a final written warning it. Accordingly the respondent submits that whilst the claimant may subjectively have a sense of unfairness as he believes the sanction was too harsh, the question is whether objectively the respondent had reasonable and proper cause to impose the sanction it did. The respondent submits that it is self-evident given the claimant's admission as to the misconduct and that the disciplinary sanction could have been harsher that it did have reasonable and proper cause to issue a final warning. In my judgement that must be correct and I cannot identify in respect of the hazardous waste incident anyway in which the respondent was in fundamental breach of the implied term of mutual trust and confidence.

10. The next complaint relates to an allegation made on 28th July 2017. The claimant was invited to an investigatory meeting for allegedly using a forklift truck without the appropriate license or authorisation and other allegations surrounding his use of the forklift. The claimant's case, as he set out in a lengthy email in response, is that he did possess a licence and was authorised. The investigatory meeting did not ever take place and so it is not known whether the respondent would have accepted or disputed this if the investigation had gone ahead, as the claimant resigned before any such meeting could take place.

11. Thus the question before me is whether it is a breach of the implied tem of mutual trust and confidence to invite an employee to an investigatory meeting even assuming in the claimant's favour that the factual basis of the allegation is incorrect, and that it is an allegation to which he may have a complete defence. In my judgement it is impossible to conclude that an invitation to an investigatory meeting is itself a breach of the implied time simply because the employee has a complete answer to the allegation, given that that is the whole purpose of investigating an allegation. It appears to me that as a matter of principle that an invitation to an investigatory meeting cannot in and of itself and without more amount to or contribute to a breach of the implied term.

12. The next complaint relates to the fraud allegation. The fraud allegation came to the respondent's attention in or about the early part of August 2017. In an email dated 10th August 2017 from Laura Herne to Katie Thorpe, Ms Hearne set out a number of bullet points of allegations that had been conveyed to her by one of the respondents customers. It is not in dispute that this was a customer for whom the claimant worked. Essentially the allegation was that employees of the respondent had been selling the respondents products for cash to employees of the customer. Other forms of fraud were also alleged and as a result it was decide to investigate fourteen members of staff one of whom was the claimant. The claimant asserts that he is entirely innocent of any participation in any fraud. However on the 8th September he was invited to an investigatory meeting to include the fraud allegations as well as the outstanding allegations in respect of the forklift issues. Again the question for me is whether firstly a simple invitation to an investigatory meeting is capable of amounting to a breach of the implied term. For the same reasons as given above in my judgement it cannot. Even if I am wrong about that, I have in this instance seen the evidence upon which the respondent relied, and in my view the respondent had

reasonable and proper cause to invite all fourteen of the employees to investigatory meetings to investigate very serious allegations. I cannot see anything in that invitation which could amount to or contribute to a breach of the implied term.

13. The final allegation is of being "hounded" by the respondent whilst off sick. It appears to me having seen all of the communications that they are all entirely reasonable. Moreover the fact that the claimant is off work sick is not in and of itself a reason not to contact him. Indeed the conclusion of the occupational health report dated 17th August 2017 was that the claimant was fit to attend disciplinary meetings and that resolving the disciplinary issues was likely to be beneficial to his well being in the long term. In my judgement if resolving those issues would be to his benefit it was necessarily reasonable to continue to contact him in respect of those matters. Again I cannot identify any thing which could individually or cumulatively amount to a breach of the implied term of mutual trust and confidence.

14. It follows that I cannot identify any fundamental breach of contract on the part of the respondent which would have entitled the claimant have resigned and succeeded in a claim of unfair dismissal. Accordingly the claimant's claim must be dismissed and it is not necessary to consider either the respondent's alternative submission, or the question of any Polkey deduction.

Costs

15. Following my earlier decision as to liability the respondent has made an application for its costs, estimated to be something of the order of £10,000, on the basis that the claim was misconceived in that it had no reasonable prospect of success. The respondent's position was initially set out in a lengthy and measured letter of 7th November 2018 setting out why the respondent's solicitors took the view that the claim was doomed to failure and advising the claimant to take legal advice. It appears to me that that letter was essentially correct and that in the light of the evidence that I have heard that there was no reasonable prospect of establishing that the respondent was in fundamental breach of contract. Accordingly in my judgement the threshold for making an order for costs has been passed.

16. The question is therefore whether I should exercise my discretion to do so. There are two things I have to take into account. Firstly the claimant's wife tells me, and I accept, that they made a number of attempts to take legal advice including attending Newport CAB, the Speakeasy in Cardiff, and the free 1 hr advice provided by a firm of solicitors. Although haven't seen that advice and privilege has not been formally waived she tells me that they were not at any time advised that the claim was doomed to failure and that it would not have been pursued if they had. As Mr Khan points out it does not follow from that that it had a good prospect of success. I bear in mind that in exercising the costs jurisdiction I am entitled to consider whether a litigant in person should have appreciated that his claim was weak given that he did seek a number of sources of legal advice. In addition I am told that the claimant's financial situation is that he currently earns something of the order of £150 per week and that once essential payments he is left with approximately £40.

17. Putting those two factors together whilst I accept the essential correctness of Mr Khan's submission that the respondent has been put to the expense of defending a claim which had no reasonable prospect of success, in the circumstances I am just persuaded not to exercise my discretion to make an order for costs.

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EMPLOYMENT JUDGE

Dated: 2nd April 19

Judgment entered into Register
And copies sent to the parties on

8 April 2019

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for Secretary of the Tribunals